RECORD AND BRIEFS

NO. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis - Petitioner,

vs.

United States of America - Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
SEP 15 2015
OFFICE OF THE CLERK

Motion For Leave to Proceed In Forma Pauperis

Pursuant to Rule 39 of the Rules of this Court, the Petitioner, Richard Mathis, asks leave to file the attached Petition for Writ of Certiorari, without prepayment of costs, and to proceed in forma pauperis.

The petitioner was represented by counsel appointed pursuant to Title 18, United States Code § 3006(a) (the Criminal Justice Act) both in the district court and on appeal to the Eighth Circuit Court of Appeals. Petitioner is incarcerated in the Federal Bureau of Prisons and remains indigent.

RESPECTFULLY SUBMITTED,

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense?

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IN THE SUPREME COURT OF THE UNITED STATES

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United States of America - Respondent.

On Petition for a Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Richard Mathis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 14-2396, entered on May 12, 2015. Rehearing en banc was denied on June 23, 2015.

OPINION BELOW

On May 12, 2015, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The opinion of the Court of Appeals is reported as *United States v. Mathis*, 786 F.3d. 1068 (8th Cir. 2015).

JURISDICTION

The Court of Appeals entered its judgment on May 12, 2015. On June 23, 2015, the Court of Appeals denied the petitioner's request for rehearing and rehearing en banc. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(2):

> As used in this subsection –
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

Iowa Code § 713.1 (1989) (burglary):

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary. (emphasis added)

Iowa Code § 702.12 (1989) (defining "occupied structure")

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an *"occupied structure"* whether or not a person is actually present....

STATEMENT OF THE CASE

The petitioner pled guilty to unlawful possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Mathis*, 786 F.3d at 1070. Because the district court found that petitioner had at least three prior felony convictions for violent felonies (including five Iowa burglary convictions), the court sentenced him to the statutory minimum sentence of fifteen years of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). *Id.* at 1070-71. On appeal, the Eighth Circuit found that at least two of petitioner's convictions for burglary, and an uncontested conviction for the interference with official acts inflicting serious injury, qualified defendant for armed career criminal sentencing. *Id.* at 1075.

In determining whether petitioner's burglary convictions were for "generic burglary" as required for ACCA purposes, *see Taylor v. United States*, 495 U.S. 575, 599, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Court of Appeals recognized that Iowa's burglary offense is broader than generic burglary because the offense's central element of an "occupied structure" includes vehicles as well as buildings and structures. *Mathis*, 786 F.3d at 1074. However, because a separate Iowa statutory provision defines "occupied structure" alternatively, the court utilized the "modified categorical approach" to find that the alternative definition involved in two of the prior burglary convictions was for a building (specifically, a garage):

> Upon examining the charging documents that correspond with *Mathis's* burglary convictions, *Mathis* was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a "building," we find that *Mathis* was convicted under the element of the Iowa burglary statute that conforms with generic burglary.

Mathis, 786 F.3d at 1075.

Petitioner respectfully submits that the court's inquiry should have ended with the finding that the Iowa burglary statute sweeps more broadly than generic burglary because of the wide–ranging occupied structure element. It was error to extend the modified categorical approach to the separate statutory definitional provision, which provided mere means of satisfying the occupied structure element, not further discrete elements of the offense itself.

REASONS FOR GRANTING THE WRIT

There is a circuit split on whether the modified categorical approach should extend to statutory definitional provisions that are separate from, but serve to explain, terms used in a statute of conviction. *See Mathis*, 786 F.3d at 1075 n.7 (noting split). This split, in turn, is grounded in part on a larger split over whether "statutory alternatives" for purposes of invoking the modified categorical approach includes alternatives that are deemed "means" of proving an element rather than a necessary "element" itself of conviction. *See Mathis*, 786 F.3d at 1075 n.6 (noting split); *compare United States v. Ozier*, No. 14-6439, 2015 WL 4636669, at *4-6 (6th Cir. August 5, 2015) (eschewing distinction between means and elements in rejecting argument that alternative statutory definitions of "habitation" element in burglary statute were beyond inquiry under the modified categorical approach), *with Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) (requiring that statutory alternatives set forth alternative elements and not merely means "on which the jury may disagree yet still convict."), *and United States v. Fuertes*, Nos. 13-4755 and 13-4931, 2015 WL 4910113, at *8 (4th Cir. Aug. 18, 2015) (agreeing with *Rendon* that inquiry focuses on alternative elements not alternative means); *see generally United States v. Vinson*, No. 14-4078, 2015 WL 4430889, at *5 (4th Cir. July 21, 2015) (finding case law definitions of "assault" element were alternative elements, not alternative means, when the definitions "provide full functioning, stand alone, alternative definitions of *the offense itself*, and these definitions capture the entire universe of ways in which an assault may be

committed."); *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1777 (2014) (finding that alternative state case law definitions of "assault" element were merely alternative means of establishing the element and not alternative elements or versions of the assault offense that permits application of the modified categorical approach).

Much of the split stems from a sentence in footnote 2 of this Court's decision in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), which appeared to reject any distinction between means and elements in applying the modified categorical approach. *Descamps*, 133 S. Ct. at 2285 n.2. Because that sentence arguably contradicts the elements-centric focus throughout the *Descamps* opinion, it has contributed to division over whether courts should consider whether statutory alternatives state means rather than elements before applying the modified categorical approach. *See Rendon v. Holder*, 782 F.3d 466, 469-74 (9th Cir. 2015) (Graber, J., and Kozinski, J., separately dissenting from the denial of rehearing).

The modified categorical approach was never meant to be this hard. This Court's focus in both the categorical and modified categorical approaches has always been on the statute of conviction simpliciter. *See Descamps*, 133 S. Ct. at 2283-88; *Shepard v. United States*, 544 U.S. 13, 25-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 599-600, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). And this court's instructions have been straightforward: list the statute's elements; if they conform to or are included within the generic crime,

then conviction under the statute qualifies as an ACCA predicate; if not, then not. Of course, if the statute is written to provide for alternative charging because it states alternative ways to violate it, then it is necessary and appropriate to examine the conviction records to see which of those alternative charges under the statute was the basis for conviction. The simple statutory elements have always been the key.

The willingness, however, of the *Mathis* court and others to start delving into separate statutory or case law definitions of terms in the statute of conviction has sent courts into the means versus elements thicket, because definitional provisions are by their nature explanatory and descriptive of the means by which one might satisfy the term being defined. Much of the argument over means versus elements would go away if this court would clarify that a predicate conviction must qualify based solely on the terms as stated in the statute of conviction.

A focus strictly on the language of the statute of conviction also accords with the focus of the ACCA on uniformity of application for any given predicate. "Congress . meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287 A narrow focus on the statute of conviction alone also helps to avoid embroiling courts in a dispute about how the parties or a judge or a jury in the state court proceedings applied definitional provisions or case law. *See Descamps*, 133 S. Ct. at 2288 (noting Sixth Amendment concerns that would arise if the predicate conviction inquiry "went beyond merely identifying a prior conviction.")

Mathis read too much into footnote 2 of *Descamps* and its seeming rejection of a means versus element distinction for purposes of applying the modified categorical approach. *Mathis*, 786 F.3d at 1074-75. *Descamps* never wavered from its "elements-centric" focus. *Descamps*, 133 S. Ct. at 2285. The opinion is replete with references to *elements* as the key to both the categorical and modified categorical approaches. *See, e.g.*, *Descamps*, 133 S. Ct. at 2285 (emphasizing that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements of a crime.")

The *Descamps* majority's mention of "means" was in a footnote response to a dissent that had argued the court's prior cases employed the modified categorical approach to statutes that involved "means" rather than "elements." *Descamps*, 133 S. Ct. at 2285 n.2. The majority in *Descamps* responded that this was "news" to them, *id.*, and that, regardless, the focus remains on the statute of conviction and what it "lists." *Id.* The court's point was simply that inclusion of alternatives in the statute of conviction triggers a modified categorical inquiry to determine which of the alternative terms was the basis for conviction. The court did not purport to otherwise stray from the notion that crimes are defined by elements, not means, or that ACCA predicates must qualify as such based on their elements. *Descamps* gives this example of a divisible statute: "That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S. Ct. at 2281. That's exactly what the Iowa burglary statute in question here does not do. It

broadly makes "occupied structure" the necessary element, not the type of occupied structure. *See State v. Rooney*, 862 N.W.2d 367, 370 (Iowa 2015) (noting the jury was marshaled on the element of "occupied structure," and then given separate definitional instruction setting forth two alternative definitions of occupied structure). The separate definitional provision identifying the places that qualify as occupied structures gives meaning to and elucidates the burglary statute, much like case law functions, but it does not create distinct alternative elements or offenses. As such, it does not invite or permit application of the modified categorical approach to try and narrow the offense to fit generic burglary.

Definitions aren't elements, and they cannot turn indivisible elements into divisible ones. In *Descamps*, this Court rejected the notion that "implied" definitions for an indivisible "weapons" element could render that element divisible. 133 S. Ct. at 2290-91. The outcome should not be different for express definitions that are written by separate statute or case law.

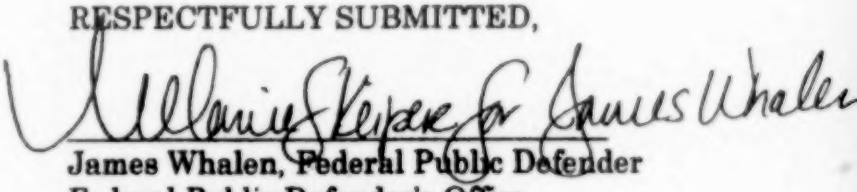
Iowa has alternative and varied definitions of its "occupied structure" element, but in the pure categorical sense, in the pure statutory sense, defendant's burglary convictions established only the illegal entry of an occupied structure, period. That is only as far as the statute of conviction goes. And because the "occupied structure" element sweeps more broadly then generic burglary, that should have been the end of the ACCA inquiry. *See Descamps*, 133 S. Ct. at 2285-86; *United States v. Simmons*, 782 F.3d 510, 516-17 (9th Cir. 2015); *United States v.*

Howard, 742 F.3d 1334, 1348-49 (11th Cir. 2014), *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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APPENDIX

Decision of United States Court of Appeals for the Eighth Circuit

United States Court of Appeals
For the Eighth Circuit

No. 14-2396

United States of America

Plaintiff - Appellee

v.

Richard Mathis

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Davenport

Submitted: December 9, 2014
Filed: May, 12, 2015

Before LOKEN, BYE, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Richard Mathis was convicted for being a felon in possession of a firearm and received an enhanced sentence under the Armed Career Criminal Act (ACCA), which applies to felons guilty of possession of a firearm who have three prior violent felony

convictions. The district court[1] also imposed special conditions of supervised release usually reserved for convicted sex offenders. Mathis appeals his sentence and the special conditions of supervised release. We affirm.

I. *Background*

On February 15, 2013, a 15-year-old boy named K.G. went missing. While missing, the boy stayed at Mathis's house. K.G. alleged that, during this time, Mathis forcibly molested him. On February 25, 2013, police officers tracked K.G.'s cell phone to Mathis's house. Mathis's girlfriend, who also stayed at the house, answered the door and told officers that Mathis was not home and that she did not know K.G.'s whereabouts. She later admitted that she lied to the officers; in fact, Mathis, K.G., and two other young males were present in the house. Later that night, Mathis took K.G. to his grandmother's house. On March 3, 2013, K.G. disclosed Mathis's alleged sexual abuse to officers.

The officers obtained several warrants to search Mathis's residence. On March 8, 2013, they executed the warrants and found a loaded rifle and ammunition. The officers also found a cell phone with nearly 6,000 text messages on it. Many of the messages were between Mathis and young males whom he had met on Meetme.com, the same social networking site through which K.G. had met Mathis. Several of the text messages were sexually explicit. These text messages showed that Mathis had traveled far to bring some of the young males whom he met on Meetme.com back to his residence. Additionally, a memory card was recovered during the search, which contained a picture of a nude underage male. Investigators also questioned Mathis's girlfriend. She admitted that she lied to officers on their February 25th visit. Mathis's girlfriend also stated that she believed that Mathis was having sexual intercourse with the boys whom he routinely brought to his house. One of the other victims, an 18-

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[1]The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

year-old male, told the officers that Mathis asked him about masturbation, asked him about the size of his genitals, and made several sexually explicit comments.

Police arrested Mathis on March 8, 2013, at his place of employment. While in custody, Mathis admitted that he owned the rifle and ammunition. Mathis also freely admitted that the officers might find child pornography on his computer and that he had visited websites to view and visit with young-looking homosexual males.

Mathis was indicted for one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), to which he pleaded guilty on January 21, 2014, in accordance with a plea agreement.

At Mathis's sentencing hearing, the court first considered whether the ACCA (18 U.S.C. § 924(e)) applied to Mathis. If Mathis possessed three prior convictions for "violent felonies," the ACCA would impose a 15-year mandatory minimum sentence. *Id.* After extensive oral argument and consideration of the Supreme Court's and this court's precedent, the district court ultimately found that Mathis's five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally, the court found that the burglaries were violent felonies under the ACCA's residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis's prior conviction in Iowa for interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months' imprisonment with five years of supervised release.

As part of the supervised release, the court imposed special release conditions routinely applied to sex offenders. The court heard testimony from two law enforcement officers that detailed Mathis's interest in young males. In addition to the information pertaining to the instant offense, the officers also disclosed a similar investigation in 1990. Then, two missing young boys, after their recovery, told police that they had been staying in Mathis's trailer. Considering this testimony, even though Mathis had never been convicted of a sex crime, the court found that the conditions of supervised release were appropriate to protect the public from Mathis.

II. *Discussion*

Mathis argues on appeal that his prior convictions for second-degree burglary are not violent felonies under the ACCA. He also challenges the imposition of sex-offender-related special conditions of supervised release.

A. *Application of the ACCA*

Mathis first argues that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argues, led the district court to erroneously conclude that his five previous burglary convictions were violent felonies for ACCA purposes.[2]

We review de novo whether a prior state-court conviction constitutes a violent felony for ACCA purposes. *United States v. Pate*, 754 F.3d 550, 553–54 (8th Cir. 2014) (citation omitted). The ACCA enhances the sentences of those defendants found

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[2]Mathis does not appeal the district court's finding that his previous Iowa conviction for interference with official acts inflicting serious injury constitutes one of the three predicate violent felonies required to apply the ACCA. Consequently, we consider this issue abandoned on appeal and will not disturb this finding. *See United States v. Batts*, 758 F.3d 915, 916 n.2 (8th Cir. 2014) (an argument raised before the district court but not raised on appeal is considered abandoned).

guilty of being a felon in possession of a firearm that have three previous convictions for "violent felon[ies]." 18 U.S.C. § 924(e)(1). As defined by the statute, a violent felony is one that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is *burglary*, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B) (emphasis added). Accordingly, Mathis contends that none of his convictions for burglary in Iowa qualify as a "burglary" as contemplated in the ACCA.

In the typical case, we use the "categorical approach" to determine whether prior convictions amount to violent felonies. *See Descamps*, 133 S. Ct. at 2283. This approach requires courts to "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602 (1990) (footnote omitted). Thus, in cases where prior convictions are for one of the named offenses in § 924(e)(2)(B)(ii), we look only at the elements of the offense as defined by the state statute to discern whether the nature of the state crime fits within the generic definition of the crime considered by the federal statute. For burglary, the Court has defined the generic crime as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. Therefore, if the state statute is "narrower than the generic view," a conviction under such statute would qualify as a violent felony for ACCA purposes "because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.*

There are a "narrow range of cases," however, in which state statutes present the necessary elements for conviction in the alternative. *See Descamps*, 133 S. Ct. at 2283–84. These alternatives, as presented in the statute, lay out one set of elements that would fit within the generic crime and another set of elements that would not. *See id.*, 133 S. Ct. at 2283–84; *see also United States v. Howard*, 742 F.3d 1334, 1343 (11th Cir. 2014). These divisible statutes can thus be divided into alternative elements,

which may in some cases constitute violent felonies, but other times may not. When approaching divisible statutes, courts are allowed to go one step further than the categorical approach to apply the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283–84. This tool allows courts to examine certain documents (such as charging papers and jury instructions) to determine under which set of alternative elements the defendant was convicted. *Id.* at 2284–86. Courts can then use their findings to properly determine whether prior convictions are violent felonies. *Id.* at 2284.

In *Descamps*, the Court attempted to clarify divisibility, but as Justice Kennedy observed, this "dichotomy between divisible and indivisible state criminal statutes is not all that clear." *Id.* at 2293 (Kennedy, J., concurring). Applying *Taylor*, the Court proposed a hypothetical state burglary statute that otherwise conformed with generic burglary, but also swept more broadly by criminalizing the "'entry of an automobile as well as a building.'" *Id.* at 2284 (quoting *Taylor*, 495 U.S. at 602). The statute in *Taylor* was a divisible statute because it presented an alternative set of elements, one of which conformed with generic burglary—entry into a building—and one of which did not—entry into an automobile. When dealing with a divisible statute, courts can then use the modified categorical approach to glean from certain approved documents of which set of elements the defendant was prosecuted and found guilty.

The Court's hypothetical became reality in *Shepard v. United States*, 544 U.S. 13 (2005). *Shepard* dealt with the divisibility of a Massachusetts burglary statute that criminalized "entries into 'boats and cars' as well as buildings." *Descamps*, 133 S. Ct. at 2284 (citing *Shepard*, 544 U.S. at 17); *see also* Mass. Gen. Laws ch. 266, §§ 16, 18 (2000). "No one could know, just from looking at the statute, which version of the offense [the defendant] was convicted of" in his guilty plea. *Descamps*, 133 S. Ct. at 2284. Thus, the Court used the modified categorical approach. In doing so, the Court delineated the scope of the modified categorical approach: "It was not to determine 'what the defendant and state judge must have understood as the factual basis of the

prior plea,' but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense." *Id.* (quoting *Shepard*, 544 U.S. at 25).

Our court has also encountered state burglary statutes like the hypothetical in *Taylor* and the convicting statute in *Shepard*. In *United States v. Bell*, we used the modified categorical approach to determine which set of alternative elements the defendant was convicted for in his prior conviction under the Missouri second-degree burglary statute. 445 F.3d 1086, 1090–91 (8th Cir. 2006). Under the Missouri statute, "a person commits second-degree burglary when he 'knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.'" *Id.* at 1090 (quoting Mo. Rev. Stat. § 569.170). The term "inhabitable structure" was elsewhere defined in the statute to "include ships, airplanes, and vehicles." *Id.* (citing Mo. Rev. Stat. § 569.010(2)). Recognizing that this statute was precisely the kind that the Court considered in its hypothetical in *Taylor*, we relied upon portions of the defendant's presentence investigation report that were deemed admitted. *Id.* The report recorded that the defendant's prior conviction under the Missouri statute was for burgling a building. *Id.* Thus, we concluded that the defendant's "prior commercial burglary conviction was . . . a generic burglary under *Taylor* and therefore a crime of violence."[3] *Id.* at 1091.We see nothing from

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[3]*Bell*'s decision was in the context of determining whether the defendant's prior second-degree burglary conviction was a "crime of violence" under U.S.S.G. § 2K2.1(a)(4)(A). The Guidelines make clear that the term "crime of violence" as used in § 2K2.1(a)(4)(A) "has the meaning given that term in §4B1.2(a)." *Id.* § 2K2.1 cmt. 1. Further, we have long held that the terms "'violent felony' and 'crime of violence' are virtually interchangeable in definition and interpretation." *United States v. Eason*, 643 F.3d 622, 624 n.2 (8th Cir. 2011) (citing *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008)). Thus, cases that analyze the term "crime of violence" in applying enhancements under §§ 2K2.1 and 4B1.1 of the Guidelines can be used to inform analysis of the term "violent felony" in ACCA cases, and vice versa. Consequently, *Bell*'s "crime of violence" determination is relevant to the current

subsequent Supreme Court opinions that overturn our application of the modified categorical approach in *Bell*.

Shepard and *Bell* control the instant appeal. Mathis was previously convicted five times in Iowa for second-degree burglary in violation of Iowa Code §§ 713.3 and 713.5.[4] In Iowa, burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (1989) (emphasis added). Second-degree burglary is a burglary "in or upon an *occupied structure*" in which no persons are present, the burglar "has possession of an explosive or incendiary device or material" or other dangerous weapon, "or a bodily injury results to any person." *Id.* § 713.5(1)(a) (emphasis added). Second-degree burglary can also be committed if a person is present when the burglary happens but the burglar does not have possession of any of the aforementioned items and there is no bodily injury to any person. *Id.* § 713.5(1)(b).[5]

"violent felony" discussion.

[4]Mathis's first conviction was in 1980 for second-degree burglary, in violation of Iowa Code § 713.3; the other four convictions came in 1991, when the second-degree burglary statute was found in § 713.5. Both parties acknowledge the burglary statute was amended in 1984; for simplicity, the parties have agreed to argue on the language as contained in the 1989 version of the statute, under which Mathis was convicted for the second through fifth burglaries.

[5]Iowa's statutes provide multiple means of committing second-degree burglary, including (1) perpetrating the burglary when someone is present in the place being burgled, (2) perpetrating the burglary when possessing certain items, or (3) if a bodily

Thus, a conviction of burglary, at first glance, seems to fit within generic burglary of "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. The Iowa statute, however, sweeps more broadly than generic burglary because the term "occupied structure" is defined elsewhere in the statute as:

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present.

Iowa Code § 702.12. Consequently, it is impossible to know from looking at the convicting statute which set of alternative elements Mathis was convicted of: a set of elements that conforms with generic burglary—entry into a "building" or "structure"—or a set of elements that does not—entry into a "land, water or air vehicle." The statute exhibits the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard* and *Bell*. As in the latter mentioned cases, the modified categorical approach is the proper tool to determine whether Mathis's prior convictions are "violent felonies."

Mathis argues against this conclusion by asserting that the convicting statute and definition of "occupied structure" do not present alternative elements, but instead

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injury to any person occurs during the commission of the burglary. These alternative elements, however, are irrelevant to divisibility because these alternatives have no bearing on the statute's conformity to the generic burglary definition. "General divisibility . . . is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, a crime of violence." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013).

simply present different types of occupied structures that can be burgled. Therefore, "[t]he jurors need not all agree on whether" he burgled a building, a boat, or a car, "because the actual statute requires the jury to find only" that he burgled an occupied structure. *Descamps*, 133 S. Ct. at 2290. This argument amounts to the means/elements distinction that was explicitly rejected in *Descamps*. *Descamps* held that the Court's decisions in *Taylor*, *Shepard*, and *Johnson* "rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different . . . crimes,' not several different methods of committing one offense." *Id.* at 2285 n.2 (alterations in original) (quoting *Johnson*, 559 U.S. at 144). The Court then instructed that

> [w]hatever a statute lists (*whether elements or means*), the documents we approved in *Taylor* and *Shepard* . . would reflect the crime's elements. . . . When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. (emphasis added). The Court's instruction clarifies the distinction between elements and means in analyzing potentially divisible statutes.[6] In the present case, the

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[6]We recognize the elements/means distinction is a matter that splits our sister circuits. *Compare United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) ("Rather than alternative *elements*, then, 'offensive physical contact' and 'physical harm' are merely alternative *means* of satisfying a single element of the Maryland offense."), *and Howard*, 742 F.3d at 1348–49 (finding that a disjunctive "or" statement that listed alternative places that could be burgled were "illustrative examples" and not "alternative elements"), *and Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) ("To be clear, it is black-letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means. Thus, when a court encounters a statute that is written in the disjunctive (that is, with an 'or'), that fact alone cannot end the divisibility inquiry." (citation omitted)), *with United States v. Prater*, 766 F.3d 501, 510 (6th Cir. 2014) (finding a New York statute divisible when it listed several alternative places that could be burgled in a disjunctive "or" statement).

term "occupied structure" reflects various places for unlawful entry that the statute criminalizes by providing a disjunctive list of buildings that can be burgled under the statute.[7] Whether these amount to alternative elements or merely alternative means to fulfilling an element, the statute is divisible, and we must apply the modified categorical approach.

Upon examining the charging documents that correspond with Mathis's burglary convictions, Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a "building," we find that Mathis was convicted under the element of the Iowa burglary statute that

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[7]We also acknowledge another split in our sister circuits that is relevant for this appeal: whether a court can consider a statute or subsection, outside of the convicting statute, that defines a term in the convicting statute. *Compare United States v. Hockenberry*, 730 F.3d 645, 669 (6th Cir. 2014) (consulting a different statute that defined the term "occupied structure" to determine the divisibility of a Pennsylvania burglary statute), *and United States v. Herrera-Alvarez*, 753 F.3d 132, 139–40 (5th Cir. 2014) (consulting a different statute that defined the term "dangerous weapon" to determine the divisibility of a Louisiana battery statute), *and United States v. Trent*, 767 F.3d 1046, 1056 (10th Cir. 2014) (consulting other statutes cross-referenced in a conspiracy statute to determine divisibility), *cert. denied*, No. 14-7762, 2015 WL 732162 (U.S. Feb. 23, 2015), *with United States v. Simmons*, — F.3d —, 2015 WL 1499310, at *4-5 (9th Cir. April 3, 2015) (declining to consult a separate statute that defined the term "custody" in a Hawaii escape statute).

Our case law allows such cross-referencing to definitions of defined terms outside the convicting statute. *See, e.g.*, *United States v. Martinez*, 756 F.3d 1092, 1095–96 (8th Cir. 2014) (finding that Ariz. Rev. Stat. § 13-3102(A) was divisible because of "the fourteen subsections of Ariz. Rev. Stat. § 13-3102(A) *and the numerous disjunctive definitions of the relevant terms* defined in Ariz. Rev. Stat. § 13-3101(A)." (emphasis added)); *Bell*, 445 F.3d at 1090 (consulting a separate section of the convicting statute for the definition of the term "inhabitable structure" in a divisibility determination).

conforms with generic burglary. When combining these two convictions with Mathis's conviction for interference with official acts inflicting serious injury, *see supra* n.2, we hold that Mathis has the requisite predicate "violent felonies" to be categorized as an armed career criminal under the ACCA.

B. *Sex-Offender-Related Special Conditions of Supervised Release*

Mathis next argues that the district court abused its discretion by imposing special conditions reserved for sex offenders because the conditions result in a greater deprivation of liberty than is reasonably necessary to fulfill the goals outlined in 18 U.S.C. § 3553(a).

"[T]his court reviews the terms and conditions of supervised release for abuse of discretion . . . ." *United States v. Schaefer*, 675 F.3d 1122, 1125 (8th Cir. 2012) (citation omitted). Generally, "[a] district court has broad discretion to impose special conditions of supervised release, so long as each condition complies with the requirements set forth in 18 U.S.C. § 3583(d)." *United States v. Morais*, 670 F.3d 889, 895 (8th Cir. 2012) (quotation and citation omitted). Such requirements mandate that special conditions are "reasonably related to the factors set forth in" § 3553(a), and that the conditions "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in" the same section. 18 U.S.C. 3583(d)(1)–(2).

We have previously upheld special conditions of supervised release applied to sex offenders even when the underlying conviction was not for a sex offense. *See United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010) (upholding sex-offender-related special conditions of supervised release for conviction of being a felon in possession of a firearm); *United States v. Smart*, 472 F.3d 556, 559 (8th Cir. 2006) (same). Both *Kelly* and *Smart*, however, involved defendants that had previously been convicted of sex crimes. The question is, then, if Mathis's previous conduct justifies the imposition of the special conditions.

The district court heard extensive testimony from two law enforcement officers concerning allegations of sexual abuse made by K.G.—which happened contemporaneously with the charged offense—and allegations of sexual abuse made by two male children in 1990. In addition, the presentence investigation report (PSR) detailed instances where Mathis was found to have violated his parole for previous offenses on two different occasions regarding inappropriate behavior with young males. First, Mathis was arrested for conducting lascivious acts with a child in 1986; several individuals alleged Mathis exhibited inappropriate behavior towards their young male children in connection with this arrest. Second, Mathis's parole was revoked in 1989 when allegations surfaced that he performed fellatio on an 11-year-old boy. Mathis did not contest these portions of the PSR, allowing the district court to "accept [the] undisputed portion[s] . . . as a finding of fact." *United States v. Lee*, 570 F.3d 979, 982 (8th Cir. 2009) (quotation and citation omitted). Further, sentencing courts are allowed to make "findings . . . based on any information other than materially false information." *Schaefer*, 675 F.3d at 1124.

Based on the wealth of evidence presented of Mathis's improper acts toward young males, we find no abuse of discretion in the district court's finding that sex-offender-related special conditions were appropriate to deter Mathis, to protect the public from Mathis, and to provide Mathis with correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(B)–(D).

III. *Conclusion*

For the reasons stated, we affirm Mathis's sentence under the ACCA and the district court's imposition of sex-offender-related special conditions of supervised release.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis Petitioner,

vs.

United States of America - Respondent.

PROOF OF SERVICE

I, James Whalen, a member of the Bar of this Court, hereby certify that on September 15, 2015, one copy of the Petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis in the above-entitled case were mailed by depositing them in a U.S. Postal Service Depository located at Des Moines, Iowa, first class postage prepaid addressed to counsel for the respondent:

Solicitor General of the United States
Room 5614, Department of Justice
10th Street and Constitution Avenue, NW
Washington, D.C. 20530.

I further certify that all parties required to be served have been served.

RESPECTFULLY SUBMITTED,

Melanie Kiefer for James Whalen

James Whalen, Federal Public Defender
Federal Public Defender's Office
Capital Square, 400 Locust St., Suite 340
Des Moines, Iowa 50309
Phone: (515) 309-9610 Fax: (515) 309-9625
ATTORNEY FOR PETITIONER

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Travel History

Date/Time	Activity	Location
- 9/16/2015 - Wednesday		
9:47 am	Delivered	Washington, DC
8:57 am	On FedEx vehicle for delivery	WASHINGTON, DC
7:30 am	At local FedEx facility	WASHINGTON, DC
5:54 am	At destination sort facility	DULLES, VA
3:04 am	Departed FedEx location	MEMPHIS, TN
- 9/15/2015 - Tuesday		
11:17 pm	In transit	MEMPHIS, TN
10:24 pm	Arrived at FedEx location	MEMPHIS, TN
7:21 pm	Left FedEx origin facility	DES MOINES, IA
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4:59 pm	Picked up Tendered at FedEx Office	DES MOINES, IA
3:25 pm	Shipment information sent to FedEx	

Shipment Facts

Tracking number	774515882661	**Service**	FedEx Standard Overnight
Weight	5 lbs / 2.27 kgs	**Delivered To**	Shipping/Receiving
Total pieces	1	**Total shipment weight**	5 lbs / 2.27 kgs
Shipper reference	Richard Mathis Cert Petition	**Packaging**	FedEx Box
Special handling section	Deliver Weekday		

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Davenport
Terence McAtee
Diane Helphrey
Research & Writing Attorney
John Messina

September 15, 2015

VIA FEDERAL EXPRESS

Mr. Scott S. Harris
Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: *Richard Mathis v. United States*

Dear Mr. Harris:

Enclosed with this letter is an original Motion for Leave to Proceed in Forma Pauperis with attached Petition for Writ of Certiorari, and Proof of Service on behalf of Mr. Mathis, along with 10 copies. I have also enclosed an extra copy. Please file the documents in your court and return a file-stamped copy to me in the enclosed, self-addressed stamped envelope.

Please contact me if you have any questions. Thank you for your assistance.

Sincerely,

Melanie S. Keiper for James Whalen

James Whalen
Federal Public Defender

JFW/mlc
Enclosures
cc: Richard Mathis

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